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In The
Supreme Court Of The United States
October Term, 1984

CAMEO CONVALESCENT CENTER, INC.,
a Wisconsin corporation,
Cross-Petitioner,
v.
DARLA SENN, et al.,
Cross-Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION
FOR WRIT OF CERTIORARI
WITH APPENDIX

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QUESTIONS PRESENTED

1. Is a malicious prosecution in
a state administrative proceeding,

without more, a deprivation actionable under 42 U.S.C. sec. 1983?

2. Did the Court of Appeals invade a function of the jury in determining that cross-respondent Senn's initiation of the administrative proceedings did not subject cross-petitioner to the subsequent event of a deprivation of placement on the suspension of referrals list without a hearing?

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STATEMENT OF THE CASE

Cross-respondent takes exception to cross-petitioner Cameo's suggestion that Senn, by failing to cooperate with agency personnel, was responsible for delays in hearings to which Cameo was entitled and Cameo's veiled implication that the jury might have found that her failure to cooperate was responsible for the placement of Cameo on the suspension of referrals list (SORL) without a hearing.

Senn had resisted disclosure of her personal notes taken during the course of the September 19, 1978, survey on the grounds that they were confidential. On advice of counsel, however, these notes were produced by November 1, 1978. (Trial exs. 25, 31, 32, 33, 39-41, 50,

1020; tr. (Siegel) 9/17/82 at 178-80.)
The SORL did not issue until April 4,
1979. (Ex. 121.)

Cameo did not receive a hearing within thirty days although Wisconsin law requires a hearing in that time. However, that thirty-day period ran from the time Cameo appealed Senn's NOV's, which was on September 28, 1978. (Ex. 36.) Further, Wisconsin law provided for a single hearing if a nursing home appealed NOV's and a plan of correction (POC) was imposed. Wis. Stats. sec. 50.04(4)(e) (1977) (pet. for cert. app. at 114.) A POC was imposed on Cameo on October 17, 1978. (Ex. 47.) Moreover, Wisconsin administrative practice had construed the thirty-day

requirement as directory and not mandatory. (Tr. (Patterson) 9/18/82 at 297-98.) Finally, that there was no nexus between Senn's initial issuance of NOV's in September and the placement of Cameo on the SORL the following April was determined by the jury (pet. for cert. app. at 66), by the district court (cross-pet. for cert. app. at 2A), and by the Court of Appeals. (Pet. for cert. app. at 46-47.)

Cross-respondent Senn believes Cameo's description of the court's instructions to the jury for finding liability is incomplete. The court instructed the jury that it could find liability against Senn on a number of different bases: for malicious prosecution, for abuse of process, for retaliation for first amendment activity, for a denial of due process in

connection with placement of Cameo on the SORL, or for the denial of a timely hearing on the NOV's and the POC. (Tr. 9/21/82 at 140-44.) The jury found liability only for malicious prosecution and abuse of process.

SUMMARY OF ARGUMENT

A malicious prosecution or abuse of process, without more, is not actionable as a deprivation under 42 U.S.C. sec. 1983. Indeed, state actors are absolutely immune from the decision to initiate or continue administrative proceedings. The lower courts consistently have held that a malicious prosecution can become actionable only if it additionally subjects the plaintiff to an independent deprivation.

The Court of Appeals did not invade the jury's function in concluding that Senn's NOV's in September 1978 did not subject Cameo to the deprivation of placement in April 1979 on the SORL without a hearing. The jury so found. The district court so found. And the other circumstances of the case warranted the Court of Appeals' conclusion that the connection between the NOV's and the SORL was too attenuated to find the necessary nexus, or affirmative link, to say that Senn subjected Cameo to the SORL deprivation.

ARGUMENT

**I. The Law Is Settled That A
Malicious Prosecution,
Without More, Does Not
Constitute A Deprivation
Actionable Under 42
U.S.C. Sec. 1983.**

Cameo suggests that it is ironic this Court has not ruled when a malicious prosecution or abuse of process is an actionable constitutional tort.

But it is not ironic. Malicious prosecution always has been thought of as a state law tort. This Court consistently has eschewed converting every state tort by a state actor into a constitutional claim. See Baker v. McCollan, 443 U.S. 137, 146 (1979); Paul v. Davis, 424 U.S. 693, 701 (1976). Indeed, this Court has absolutely immunized state actors from malicious prosecution liability stemming from

their decision to initiate or continue those proceedings, noting that the "decision to proceed with a case is subject to scrutiny in the proceeding itself" and that claims of unconstitutional proceedings are reviewable by the courts. Butz v. Economou, 438 U.S. 478, 516 (1978).

Consistent with these principles, the lower courts uniformly hold that a malicious prosecution or abuse of process is not itself an actionable deprivation. See Hampton v. Hanrahan, 600 F.2d 600, 630 (7th Cir. 1979); Buckley Towers, Etc. v. Buchwald, 595 F.2d 253, 254 (5th Cir. 1979); Beker Phosphate Corp. v. Muirhead, 581 F.2d 1187, 1189 (5th Cir. 1978); Paskaly v. Seale, 506 F.2d 1209, 1211 (9th Cir.

1974); Curry v. Ragan, 257 F.2d 449 (5th Cir.), cert. denied, 358 U.S. 851 (1958); Cramer v. Crutchfield, 496 F. Supp. 949, 953 (E.D. Va. 1980), aff'd., 648 F.2d 943 (4th Cir. 1981).

Cameo's attempt to portray a conflict among the circuits confuses the rule that malicious prosecution, without more, is not actionable with the rule that it is actionable if it also subjects the plaintiff to a constitutional deprivation.

Cameo relies on Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), to show a conflict among the circuits. Marrero, however, concerned the independent deprivations from an illegal search and seizure and publicly issued

defamatory statements impairing protected business interests; nowhere did it suggest that a malicious prosecution, without more, is actionable. Consequently, Marrero is not at all inconsistent with the Fifth Circuit's holdings in Baker Phosphate Corp. v. Muirhead, Curry v. Ragan, or Buckley Towers, Etc. v. Buchwald.

Nor was the Seventh Circuit inconsistent with Hampton v. City of Chicago, 484 F.2d 602, 609 (7th Cir. 1973). There the court held only that the unfounded prosecution and concealment of the truth "aggravated the plaintiffs' injuries" of the independent deprivations of false arrest and imprisonment.

Nor was the First Circuit at odds with this rule in Roy v. City of Augusta, Maine, 712 F.2d 1517, 1524 (1st Cir. 1983). There, a state court had ordered the grant of a business license to the plaintiff, but the city refused to grant it and thereby succeeded in "'taking' his property in derogation of the process afforded by the state."

Nor did the Ninth Circuit contradict its Paskaly v. Seale holding in Mayer v. Wedgewood Neighborhood Coalition, 707 F.2d 1020, 1023 (9th Cir. 1983). It simply upheld a defendant's right to obtain costs for a frivolous suit, leaving the question of the plaintiff's motives for resolution as a factual matter rather than on the pleadings.

Nor was the Tenth Circuit at odds with the rule in Wells v. Ward, 470 F.2d 1185 (10th Cir. 1972). The court held only that there was no "deprivation" by an arrest and detention for refusing to agree to appear on a traffic violation charge. Similarly, Madison v. Manter, 441 F.2d 537 (1st Cir. 1971), involving an invalid search, held only that the officers who acted negligently but in good faith in obtaining the warrant were not liable in damages.

To be sure, Henry v. City of Minneapolis, 512 F. Supp. 293, 296 (D. Minn. 1981), noted a lack of consistency among the cases. But 'the lack of consistency' related to the degree of deprivation necessary to make an accompanying malicious prosecution actionable. The same court had no trouble, after reviewing all the cases,

in saying that the successful plaintiffs' cases "involved a greater invasion of personal liberty than the mere apprehension of proceedings... ." 512 F. Supp. at 297.

Finally, Cameo relies on Jennings v. Shuman, 567 F. 2d 1213, 1220 (3rd Cir. 1977), for the rule that an abuse of process is "by definition a denial of procedural due process" actionable under sec. 1983. Jennings, however, did not hold that abuse of process is actionable as a violation of due process. It held the abuse was actionable because of the "deprivation of liberty concomitant to arrest," and added that such "deprivations without due process state an injury actionable under section 1983." 567 F.2d at 1220. Further, even if Jennings did hold that abuse of process or a denial of due process

itself is actionable, apart from an independent deprivation, the holding has been eclipsed by Olim v. Wakinekona, 103 S. Ct. 1741, 1748 (1983), that a denial of due process is not itself an actionable deprivation.

**II. The Court Of Appeals Did
Not Invade The Jury
Function Of Determining
Causation**

Cameo contends the Court of Appeals invaded a jury function in ruling there was no causal connection between Senn's NOV's and its placement on the SORL without a hearing. Cameo cites the general rules that a court should not reverse a jury finding on causation and that a court should try to harmonize

apparently conflicting jury answers. The Court of Appeals failed to harmonize and failed to uphold a liability verdict, Cameo asserts, because it upset the finding of liability on malicious prosecution by reliance on the no-liability finding on placement on the SORL.

The Court of Appeals did not reverse a jury finding that Senn's NOV's proximately caused placement on the SORL. Cameo admits it never asked that the jury so find. (Cross-pet. at 20.) Cameo seeks to overcome this omission by saying that, since the jury knew Cameo was protesting a deprivation, the jury found a causal connection between the NOV's and the SORL in finding liability for the NOV's.

The jury's basing liability on malicious prosecution is not a finding of causation for placement on the SORL. The contrary is not made credible because Cameo asserts it.

Moreover, the jury was separately instructed on liability for malicious prosecution and liability for the SORL. (Tr. 9/21/82 at 140-44; brief in opp. app.). Thus, on Cameo's assumption that the jury followed the instructions, the jury knew it could find liability from either the malicious prosecution or the SORL or both. It found liability only for the malicious prosecution. Cameo's argument actually would require the Court to assume the jury was confused and meant one thing when it said another.

The Court of Appeals did not fail to harmonize the liability finding for malicious prosecution with the no-liability finding for the SORL. Rather, the Court of Appeals held that there can be no liability for malicious prosecution, without more, and that the no-liability finding on the SORL evidenced the jury's finding that there was not more because it found Senn was not responsible for placing Cameo on the SORL without a hearing.

Cameo mistakenly characterizes the district court as having found a causal connection between Senn's NOV's and the SORL. In fact, the district court found no causation. It said Senn was "not personally and directly responsible for

a number of subsequent events that followed." (Cross-pet.-app. at 2A.) That language is a finding of no causation with the subsequent event of the SORL.

Moreover, that language, coupled with the prior sentence that Senn's NOV's started a process which "could have resulted in the denial" of a property right, was the district court's recitation of evidence supporting the jury finding of malicious prosecution. It is anything but a finding that the process which "could have" resulted in a property deprivation did work a deprivation.

Cameo argues that, even if the jury found no causation or failed to find causation, the Court of Appeals should have found it as a matter of law because Senn's tortious NOV's converged with the

denial of predeprivation hearing for the SORL. Placement on the SORL, with or without a hearing, could not have occurred but for the existence of the outstanding Senn NOV's, Cameo argues.

Now Cameo wants the Court to displace the jury. Its argument conveniently ignores the effect of the jury verdict of no responsibility for placement on the SORL, and it conveniently ignores the district court's concurrence in that conclusion.

Further, Cameo's argument confuses conditions with proximate causation. On Cameo's approach, Senn's supervisor would be a joint tortfeasor, for Senn would not have issued the NOV's but for the supervisor's assignment to inspect Cameo, and the person who hired Senn similarly would be liable on this but-for theory. But to "subject" or "cause

to be subjected" to a deprivation under sec. 1983, requires a causal nexus that is the "affirmative link" between the act and the deprivation. See Rizzo v. Goode, 423 U.S. 362, 371, 375-76 (1975).

The fact is, too much separated the NOV's from the SORL to enable the Court of Appeals to find the affirmative link as a matter of law. Cameo acknowledges the intervention of verification visits by two inspectors on January 2, 1979. Had they determined that there were no uncorrected NOV's, there would have been no eligibility for the April SORL. Wis. Stats. sec. 50.04(4)(d) (1977) (Pet. App. at 113.) Thus, it was the uncorrected status of the NOV's as perceived by two independent investigators that determined eligibility for the SORL the next April. Second, after the results of the

January investigation came the notice to Cameo of an intent to place it on the SORL, followed by Cameo's appeal and request for a hearing, followed by mislaying the appeal until after the SORL issued without hearing. (Pet. App. at 71-76, 78-81, 84-85, 86, 92-94.) Clearly there was no foreseeability in September of 1978 that this series of events would unfold. Superseding factors caused Cameo's placement on the SORL without a hearing, not the initial issuance of NOV's the previous September. At best, they were separate torts, not joint torts.

In any event, the Court of Appeals did not depart from clearly established

rulings of this Court in concluding that the connection between the NOV's and the SORL was too attenuated to support a holding of direct responsibility for the affirmative link as a matter of law.

Should this Court nevertheless grant review of this issue, it will be necessary also to dispose of Senn's defense of prosecutorial immunity. For a reversal of the Seventh Circuit on the ground of causation would not require affirmance of the trial court's judgment against Senn.

Senn argued that, even if her NOV's proximately caused placement on the SORL without a prior hearing, the issuance of the NOV's initiated an administrative proceeding. Absolute prosecutorial immunity attaches to the decision to

initiate or continue administrative hearings. Butz v. Economou, 438 U.S. 478, 515 (1978). Both the district court (Cross-pet. App. at 2A) and the cross-petitioner agree that Senn's NOV's started the process. (Cross-pet. at 24.) Indeed, that is the basis of cross-petitioner's proximate cause argument. The function of prosecutorial immunity is to insulate this kind of decision from suits for malicious prosecution. The Court of Appeals declined to address this argument because judgment against Senn had to be reversed on other grounds. (Pet. for cert. app. at 47.)

CONCLUSION

It is respectfully submitted that the cross-petition for a writ of certiorari should be denied.

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CROSS-RESPONDENT'S APPENDIX

**From the Transcript of September
21, 1982, at 140-44.**

Instructions to the jury

Now, the purpose of the Civil Rights Act. The statute, we call it 1983. The statute just outlined to you comprises one of the Civil Rights Acts enacted by Congress under the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment to the Constitution provides: no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Malicious prosecution. Plaintiffs claim that defendants, in preparing for filing and prosecuting the Notices of Violation, maliciously prosecuted Cameo Convalescent Center. To find the

defendants or any one of them are liable for malicious prosecution, the plaintiff must show, in addition to several facts which are uncontested, one, any of the defendants prepared Notices of Violation without probable cause; two, there was malice in preparing or prosecuting the Notices of Violation against Cameo.

Plaintiff bears the burden of convincing you that both elements have been established by a preponderance of the evidence.

First probable cause. The term probable cause is defined to be such a state of facts within the knowledge of the defendant as would lead a person of ordinary caution and prudence to believe that the person investigated is guilty of the violation charged.

Whether the facts known to the defendants were such as to lead them, as

people of ordinary caution and prudence, to believe and entertain an honest and strong suspicion that the plaintiff was guilty of such charge is a question of fact to be determined by you, the jurors, in this case.

The burden of proof to show that there was a lack of probable cause on the part of the defendants rests upon the plaintiff to so establish such lack of probable cause to a reasonable certainty, by the greater weight of the credible evidence in this case.

Malice. That means a condition of mind which prompts a person to do a wrongful act willfully; that is, on purpose, to the injury of another or to do intentionally a wrongful act toward another without justification or excuse.

Abuse of process. Plaintiff also claims that defendants should be held liable for abuse of process. To prevail on this claim, plaintiffs again must show by a preponderance of the evidence the following two elements: one, that the Notices of Violation were prepared and prosecuted against Cameo Convalescent Center due to an ulterior and improper motive; and, two, that defendants threatened or acted in a manner not authorized by the administrative process.

There's a First Amendment claim. In order to prove the claim that its rights to free speech and to petition the government were violated by a defendant, the burden is upon the plaintiff, Cameo Convalescent Center, to establish by a preponderance of the evidence in the case that an act of a

defendant was motivated by retaliation for plaintiff's exercise of its rights to free speech or to petition the government for redress of grievances.

It's not necessary for the plaintiff to prove the defendants' entire or sole reasons for taking the action which they alleged were taken, nor to prove such to have been an important reason; rather they must only prove that such a reason was one of the things that moved the defendants to make the decision the defendants made.

If you find that the plaintiff's speech or exercise of its rights was one of the things that contributed to the decisions to take the actions which the defendants may have taken, then you should find that the plaintiff's exercise of its rights motivated the defendants' actions or failure to act.

On the other hand, if you find that the plaintiff's actions were not one of the things that contributed to the decisions of the defendants, then you should find that those actions by the plaintiff were not a motivating factor.

Now, once the plaintiff has established that retaliation for the exercise of these rights motivated defendants' acts, then the burden shifts. The defendants must then demonstrate by a preponderance of the evidence that the defendants would have taken the same actions in the absence of such an improper motive.

If defendants carry their burden, they may not be found liable for violation of plaintiffs' rights to free speech or petition the government for redress of greivances.

Due process. To recover on their claim for violation of due process, the plaintiff, Cameo Convalescent Center, must show by a preponderance of the evidence that a defendant or defendants were personally and directly responsible for placing Cameo on the suspension of referrals list and acted with intentional disregard of Cameo's right to appeal this placement. In the alternative, plaintiffs must show that Cameo was denied a timely hearing on the Notices of Violation and the imposition of a plan of correction.